

NO. 295494

STEVENS COUNTY CAUSE NO. 05-2-00076-5

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

RONALD J. COGDELL and CATHERINE L. COGDELL
husband and wife

Appellants Cogdell
v.

1999 O'RAVEZ FAMILY L.L.C.,
a Washington Limited Liability Company

Respondent O'Ravez

APPELLANTS COGDELL'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iv
I. NATURE OF THE CASE.....	1
II. APPELLANTS' ASSIGNMENT OF ERRORS	2
III. STATEMENT OF ISSUES	4
IV. STATEMENT OF THE FACTS AND PROCEDURE.....	5
V. STANDARD OF REVIEW	12
VI. LEGAL ARGUMENT.....	13
A. Assignment of Error No.1, The Court erred in entering Conclusion of Law: The Cogdells have failed to satisfy each of the Arnold elements with clear and convincing evidence.	13
B. Assignment of Error No.2, The Court erred in entering Conclusion of Law: The Court's findings of fact entered upon conclusion of the bench trial in this matter, including Finding of Fact XXV in particular, established that the Cogdells, by not obtaining a survey, took a calculated risk in deciding where to construct their improvements and subsequently selling the property by statutory warranty deed to the O'Ravez Family.	23
C. Assignment of Error No. 3 The Court erred in entering Conclusion of Law: The Finding of Exceptions which would allow the Court to provide relief other than ejectment had been referred to as the Arnold exceptions. Absent a finding based upon clear and convincing evidence that the Arnold exceptions had been satisfied, a remedy other than ejectment becomes more than suspect.	30
D. Assignment of Error No.4, The Court erred in entering Conclusion of Law: Among others, Conclusion of Law No.2 alone defeats a finding that all of the Arnold elements are satisfied.....	33

E. Assignment of Error No.5, The Court erred in entering Conclusion of Law: The Cogdells have failed to offer clear and convincing evidence, or any evidence, as to the practicality of moving their improvements, or the expense involved in moving their Improvements.	35
F. Assignment of Error No.6, The Court erred in entering Conclusion of Law: The evidence is equally clear that the Cogdells have refused significant efforts and overtures of the O'Ravez Family's attempt to due equity prior to resorting to requesting ejectment.	36
G. Assignment of Error No. 7: The Trial Court erred in awarding defendant damages for Breach of Warranty due to appellant's Bankruptcy.	38
H. Assignment of Error No. 8: Trial court erred in awarding defendant attorney fees incurred at trial as this issue was not remanded for further action.	41
I. Assignment of Error No.9: Trial court did not find the Respondent O'Ravez had "clean Hands".	41
VII. CONCLUSION	43

TABLE OF AUTHORITIES

Cases

<i>Arnold v. Melani</i> , 75 Wn.2d 143, 152, 449 P.2d 800 (Wash. 1968)	15
<i>Cascade Timber Co. v. N. P. Ry. Co.</i> , 28 Wash.2d 684, 711, 184 P.2d 90 (1947).....	45
<i>Cascade Timber Co. v. N. Pac. Ry. Co.</i> , 28 Wn.2d 684, 711, 184 P.2d 90 (1947).....	26
<i>Cogdell v. 1999 O'Ravez Family, LLC</i> , 153 Wn.App. 384, 390, 220 P.3d 1259 (Wash.App. Div. 3 2009)	35
<i>Hegwine v. Longview Fibre Co.</i> , 132 Wash.App. 546, 555-556, 132 P.3d 789 (2006).....	23
<i>In Re Marriage of Konzen</i> , 103 Wn.2d 470, 478, 693 P.2d 97 (1985)	13
<i>In Re Pers. Restraint of Brett</i> , 142 Wn.2d 868, 873, 874, 16 P.3d 601 (2001).....	13
<i>Pepper v. J.J. Welcome Const. Co.</i> , 73 Wn.App. 523, 543-544, 871 P.2d 601 (Wash.App. Div. 1 1994)	32
<i>Pierce County v. State</i> , 144 Wn. App. 783, 185 P.3d 594 (2008)	13
<i>Proctor v. Huntington</i> , 82326-0 (WASC)	20, 36
<i>Roberson v. Perez</i> , 156 Wash.2d 33, 41, 123 P.3d 844 (2005)	44
<i>Soltero v. Wimer</i> , 159 Wn.2d 428, 150 P.3d 552 (2007).	13
<i>Sunnyside Valley Irrigation Dist. v. Diche</i> , 149 Wn.2d 873,879-80, 73 P.3d 369 (2003).....	14

Statutes

<u>11 U.S.C. § 502</u>	44
<u>11 U.S.C. § 524(a)</u>	43
<u>11 U.S.C. § 727</u>	43

Other Authorities

<u>FED. R. BANKR.P. 4004(c)</u>	40
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I. NATURE OF THE CASE

This appeal is of the trial court's decision of November 18, 2010 from a remand by this court in Case No. 271331.

This is the second appeal in this case. The first appeal was filed by the O'Ravez with their brief filed on January 28, 2009. The Cogdells filed their responsive brief on May 5, 2008. This court remanded the matter back to the trial court on December 3, 2009.

The trial court relied upon the verbatim report prepared for the first appeal with no new evidence or testimony requested or considered by the trial court.

The trial court's initial ruling which was appealed to this court in the first appeal left the appellants in their home but established an easement around the structures. This court on appeal found that ruling inequitable due to the 1999 O'RAVEZ FAMILY L.L.C. not receiving anything in exchange for the benefit extended to the Cogdells. The issues of breach of warranties or attorney fees were not remanded back to the trial court.

The trial court decision on remand was entered on November 18, 2011, which included an award of damages and attorney fees based on Breach of Warranty. The trial court further

upon remand entered an Order for Ejectment of the appellants, to be accomplished by February 15, 2011.

The Appellants Cogdell filed their Notice of Appeal on December 8, 2010.

The trial court relied upon the evidence and testimony presented at trial and encompassed in the verbatim report of proceedings. No new evidence or testimony was allowed on remand.

II. APPELLANTS' ASSIGNMENT OF ERRORS

- A. Assignment of Error No.1, The Court erred in entering Conclusion of Law:

The Cogdells have failed to satisfy each of the Arnold elements with clear and convincing evidence.

- B. Assignment of Error No.2, The Court erred in entering Conclusion of Law:

The Court's findings of fact entered upon conclusion of the bench trial in this matter, including Finding of Fact XXV in particular, established that the Cogdells, by not obtaining a survey, took a calculated risk in deciding where to construct their improvements and subsequently selling the property by statutory warranty deed to the O'Ravez Family.

- C. Assignment of Error No.3 The Court erred in entering Conclusion of Law:

The Finding of Exceptions which would allow the Court to provide relief other than ejection had been referred to as the Arnold exceptions. Absent a finding based upon clear and convincing evidence that the Arnold exceptions had been satisfied, a remedy other than ejection becomes more than suspect.

- D. Assignment of Error No.4, The Court erred in entering Conclusion of Law:

Among others, Conclusion of Law No.2 alone defeats a finding that all of the Arnold elements are satisfied.

- E. Assignment of Error No.5, The Court erred in entering Conclusion of Law:

The Cogdells have failed to offer clear and convincing evidence, or any evidence, as to the practicality of moving their improvements, or the expense involved in moving their improvements.

- F. Assignment of Error No.6, The Court erred in entering Conclusion of Law:

The evidence is equally clear that the Cogdells have refused significant efforts and overtures of the O'Ravez Family's attempt to due equity prior to resorting to requesting ejection.

- G. Assignment of Error No. 7:

Trial court erred in awarding defendant damages for Breach of Warranty due to appellant's Bankruptcy.

- H. Assignment of Error No. 8:

Trial court erred in awarding defendant attorney fees incurred at trial as this issue was not remanded for further action.

- I. Assignment of Error No. 9:

Trial court did not find Respondent O’Ravez had “clean Hands”.

III. STATEMENT OF ISSUES

1. The trial court erred in awarding defendant damages for Attorney Fees based upon Breach of Warranty due to appellant’s Bankruptcy; (CP 69)
2. Trial court erred in awarding defendant attorney fees incurred at trial and on remand as this issue was not remanded for further action; (CP 69)
3. Trial court erred in holding that the Cogdells acted in bad faith; (CP 68)
4. Trial court erred in holding that the trial court had no other remedy than to order the most harsh remedy of ejectment of the Cogdell’s home, garage and in ground pool; (CP 68)
5. Trial court erred in ordering ejectment as this was not equitable under the facts of this case; (CP 68)
6. Trial court erred in ordering ejectment as the remedy in this case (CP 68). The order of ejectment resulted in the

Respondent obtaining a windfall as the Appellants' well and building site were not intended to be part of the sale; and

7. Respondent O'Ravez does not have "Clean Hands" as O'Ravez knew at the time of acquiring the Appellants' property that the boundary line the Appellants' thought to be the property line was inaccurate, but failed to notify the Appellants Cogdell.

IV. STATEMENT OF THE FACTS AND PROCEDURE

On March 29, 1994, Appellants Cogdell purchased 80 acres in Stevens County Washington by statutory warranty deed from Norman L. Houck and Fannie L. Houck and David Chuljian and Paul A. Chuljian (11/07/07 RP 53-54) (Defendant's Exhibit 102). At the time of Appellants Cogdell's purchase of the 80 acres, there was no survey (11/07/07 RP 54). At the time of Appellants Cogdell's purchase, the property had been staked with white survey stakes from a previous logging operation (11/07/07 RP 55). The survey stakes divided the 80 acres into four twenties (11/07/07 RP 55). The survey stakes were typical survey stakes, being white 2 x 2's and approximately 18 inches tall (11/07/07 RP 56).

The property also had old logging roads which wound through the property (11/07/07 RP 56-57). Appellants Cogdell had told their friends, Respondent O'Ravez, about the 80 acres in 1994 shortly before the purchase (11/08/07 RP 202).

Appellants Cogdell's original plan for the property was to build a kid's ranch and use the full 80 acres (11/07/07 RP 57). In 1994-1995, Respondent O'Ravez, who at the time were friends of Appellants Cogdell, asked if Appellants Cogdell would be interested in selling a parcel near the lake (11/07/07 RP 59). The parties' friendship had extended over 10 years at this time (11/07/07 RP 66).

On March 13, 1995, Respondent O'Ravez executed a document whereby they agreed to an option to purchase the NW 1/4 20 acres from Appellants Cogdell (Plaintiff's Exhibit 012) (11/08/07 RP 204).

May 18, 1995, Respondent O'Ravez purchased the NW 1/4 parcel near the lake evidenced by Defendant's Exhibit 103 (11/08/07 RP 121). At the time of Respondent O'Ravez's first purchase, Appellants Cogdell had begun building on their remaining 60 acres (11/07/07 RP 58).

Respondent O'Ravez's first parcel (NW 1/4) purchased from

the Appellants Cogdell was later exchanged for SE 1/4 parcel which was also 20 acres (11/08/07 RP 207-208). At the same time Respondent O'Ravez purchased the first parcel from Appellants Cogdell, Respondent O'Ravez did not request a survey (11/07/07 RP 59), nor did Respondent O'Ravez question the white survey states then present or the boundary lines at any time (11/07/07 RP 59-60).

At the time of the first sale to Respondent O'Ravez, Appellants Cogdell had already picked out a building site on their remaining 60 acres (11/07/07 RP 60). On the site picked out, Appellants Cogdell began preparing for the foundation, including leveling off the site and removing debris (11/07/07 RP 60). During the time Appellants Cogdell were preparing their building site, both Appellants Cogdell and Respondent O'Ravez had discussions regarding the house Appellants Cogdell were building (11/07/07 RP 60-61). In fact, Appellants Cogdell had moved a trailer onto the property and Respondent O'Ravez had stayed in the trailer on several occasions while the site was being prepared (11/07/07 RP 61). Further, while the Respondent O'Ravez stayed in the Appellants' trailer, Appellants Cogdell placed a well next to their building site and had their utilities in place (11/07/07 RP 61). At

this point, foundation work was ready to begin (11/07/07 RP 61). Appellants Cogdell's site prep and building process was open and obvious (11/07/07 RP 61).

The utility company, Washington Water Power, was granted a utility easement, and the utility poles were placed on what Appellants Cogdell understood to be the boundary line between his two parcels (11/07/07 RP 62).

The water well permit for the well Appellants Cogdell placed on their building site was obtained on May 2, 1996 (Plaintiff's Exhibit 005) (11/07/07 RP 63). Tri-State Drilling finished installing Appellants Cogdell's water well on July 15, 1996 (Plaintiff's Exhibit 002) (11/07/07 RP 64-65). On August 25, 1996, Appellants Cogdell gave Tri-State Drilling a check for \$8,082.50 for completion of the water well while Respondent O'Ravez were present (Plaintiff's Exhibit 003) (11/07/07 RP 65-66). On September 30, 1996, Appellants Cogdell applied for a septic permit for their home construction (Plaintiff's Exhibit 009), (11/07/07 RP 71). The finished septic inspection was completed on August 28, 1997 (Plaintiff's Exhibit 009).

During the time Appellants Cogdell's building was in process, they owned three parcels and were building solely on their

property (11/07/07 RP 72).

On October 2, 1996, six weeks after Respondent O'Ravez witnessed Appellants Cogdell give Tri-State Drilling a check for the well, Respondent O'Ravez purchased their second parcel (not at issue in this case), the SW 1/4 parcel from Appellants Cogdell (Defendant Exhibit 105). No survey was obtained by either party on this transaction (11/08/07 RP 260).

On October 9, 1996, Appellants Cogdell obtained financing to pay for the home kit which was to be placed on the building site (Plaintiff's Exhibit 004).

On January 4, 1997, the parties agreed to exchange the NW1/4 for the SE 1/4 adjacent to Appellants Cogdell, which shares the boundary in dispute and is the subject of this appeal (11/07/07 RP 69, 182). This was achieved by the execution of a Statutory Warranty Deed (Defendants' Exhibit 107). At the time of the exchange, there was no request for a survey (11/07/07 RP 77-78).

The parcel owned by Respondent O'Ravez, which is material to this appeal (SE 1/4), was not obtained by Respondent O'Ravez until January 4, 1997 (Defendant's Exhibit 107) (11/08/07 RP 72).

At the time Respondent O'Ravez exchanged the second

parcel (the NW 1/4) for the parcel he currently owns which is the subject of this suit (the SE 1/4), Appellants Cogdell specifically pointed out what he believed to be the boundary between their properties as the power poles (utility poles) and the white survey stakes (11/07/07 RP 74-75, 81-82). The boundary in this location would have rendered all of Appellants Cogdell's improvements (well, building site) on the property they were retaining (11/07/07 RP 76).

Respondent Ron Cogdell stated in court as to what the property boundary was intended to be:

14 Q So if we looked at what markers were on the ground to
15 identify the property line, what would they be?

16 A On the ground up here at the top of the hill there was a
17 metal pin in the ground and there was a the surveyors
18 use those little sticks, I don't know what you call them,
19 with some writing on them. Red flagged. And all this
20 property that had been surveyed at one point, by who I
21 don't know, but there were a ton of different markers all
22 over the place. I mean there was survey tape. Bill put
23 survey tape out there. I put survey tape out there. We
24 walked the lines, and it was just the way it was.
25 Everybody was, you know, fine with what was going on

1 until the survey that Bill had done and found out that my
2 property was not -- my house was supposedly not on my
3 property.

11/07/07 RP 75-76.

Using the markers pointed out to Respondent O'Ravez,

Appellants Cogdell's building site and well were within their property boundary (11/07/07 RP 76). Respondent O'Ravez testified in open court that he did not care about the boundary line as established by Appellants Cogdell just as long as he had 20 acres (11/08/07 RP 259-262).

Appellant Ron Cogdell was clear in that it was not his intent to sell the well or his building site:

- 1 Q Would you have sold that second parcel to Mr. O'Ravez had
- 2 you known that he would be claiming land up to the
- 3 surveyed line?
- 4 A No.
- 5 Q Why is that?
- 6 A Well, I wasn't going to sell him my well and my house and
- 7 my building site. That makes zero sense to do anything
8. that dumb. So I didn't.

11/07/07 RP 94.

Appellants Cogdell's building site and well are depicted in Exhibit 019 as it appeared when Respondent O'Ravez purchased the property (SE 1/4) to the south of Appellants Cogdell (11/07/07 RP 79).

Respondent O'Ravez did not raise any issues concerning boundaries until after their survey in 2004, which was about eight years after they had purchased the southeast property (11/07/07

RP 93).

The parties had a bench trial on November 8, 2007, with the court entering its decision on December 27, 2007. The Respondent appealed the trial court's initial order in this court under case number 271331. This court issued its opinion on December 3, 2009, and mandated the matter back to the trial court on June 3, 2010. A hearing was held by the trial court regarding the remand from Court of Appeals regarding boundary line without new evidence or testimony on August 20, 2010. A hearing was held by the trial court regarding the Motion for Entry of Judgment Ordering Ejectment and Money Damages Pursuant to Court of Appeals Mandate on October 22, 2010. The trial court issued its ruling in the Judgment Awarding Damages and Ordering Ejectment filed on November 18, 2010, which was appealed to this court on December 7, 2010.

V. STANDARD OF REVIEW

The standard of review on an issue of law is *de novo*, likewise, contested conclusions of law are reviewed *de novo*. *Soltero v. Wimer*, 159 Wn.2d 428, 150 P.3d 552 (2007).

The standard of review on an issue of equity is abuse of discretion. *In Re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (1985).

The standard of review for determination of whether findings of fact support the trial court's conclusion of law is *de novo*. *In Re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 874, 16 P.3d 601 (2001). Where error is assigned to findings of fact review is whether the findings are supported by substantial evidence. *Pierce County v. State*, 144 Wn. App. 783, 185 P.3d 594 (2008). Substantial evidence is a quantum of evidence sufficient to persuade a rational fair minded person if the premise is true. *Sunnyside Valley Irrigation Dist. v. Diche*, 149 Wn.2d 873,879-80, 73 P.3d 369 (2003).

VI. LEGAL ARGUMENT

A. Assignment of Error No.1, The Court erred in entering Conclusion of Law:

The Cogdells have failed to satisfy each of the Arnold elements with clear and convincing evidence.

This is an unusual case which falls outside of the normal encroachment case, as this is under the facts not an encroachment case but rather one caused by a mistaken property line.

Under the facts of this case there is a lack of substantial evidence to support the court's findings that the Appellants failed to satisfy each of the Arnold elements. The trial Court has granted Respondent O'Ravez's request for the harshest of remedies which is the removal of the Cogdell home, garage, pool and well. This would be at a high cost to the Cogdells and provide a windfall for Respondent O'Ravez. This harsh treatment was considered and rejected by *Arnold v. Melani*, 75 Wn.2d 143, 152, 449 P.2d 800 (Wash. 1968) which held:

[A] mandatory injunction can be withheld as oppressive when, as here, it appears . . . that: (1) The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the landowner was slight and the benefit of removal equally small; (3) there was ample remaining room for a structure suitable for the area and no real limitation on the property's future use; (4) it is impractical to move the structure as built; and (5) there is an enormous disparity in resulting hardships.

A review of the Arnold elements reveals:

(1) The Cogdells as the encroacher did not take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure. In fact, the Cogdells began building their home and well before agreeing to sell to O'Ravez.

Appellants Cogdell began construction of their home in 1996 prior to the sale to Respondent O'Ravez. Mrs. O'Ravez stated:

9 Q When this well and house were put in, do you know when the

10 foundation was being put in?

11 A No.

12 Q Okay.

13 A I mean, it was up when I came August 31, '96.

14 Q Do you know if they had any foundation work done October,

15 November, December of '96?

16 A I don't know because we weren't over there. We did all

17 that by mail, the purchase of our property in October.

11-13-07 RP158 (Emphasis added).

The testimony of Mrs. O'Ravez indicates that the foundation work started before the property was sold to them. The Appellants were building on their own property at the time of starting construction.

The Appellants had ownership of the property at issue in this case until January 1997, four months after the foundation construction started on the Cogdell home.

Mr. O'Raviz admitted that the property at issue did not close until January 1997:

15 Q I just want -- you closed on the property in January of

16 '97?

17 A Yes.

11/08/07 RP 261.

(2) At the time Appellants Cogdell began construction on their home foundation in 1996, they owned both parcels. Appellants Cogdell did not take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate their structures thus creating an encroachment, it was making a mistake in locating the boundary line after construction had begun.

The structures were already located on the ground in 1996, but were not finished until 1997. The same situation would arise had the Appellants' home been built years earlier and the Appellants sold to the Respondent O'Ravez, later discovering a mistake in the boundary.

There is no evidence of bad faith or negligently, willfully or indifferently locating the structures as the Appellants owned both parcels when construction began.

(3) The damage to Respondent O'Ravez's property was slight and the benefit of removal equally small as this was hillside property and property the O'Ravez never intended to purchase.

As set forth above, Respondent O'Ravez never intended to purchase or use the property on which the Appellants' structures are located. Since the Respondent never intended to own this

property or use it, there was minimal or no actual damage to

Respondent O'Ravez.

Mr. O'Ravez stated that they used the property at issue for recreational purposes:

- 4 Q Okay. What were you going to use that 20 acres for?
- 5 A Recreation.

Vol 2 RP 209 Line 4-5.

No improvements and only limited visits were made by

Respondent O'Ravez:

- 1 Q Okay. During the time that you owned this property, what
- 2 improvements did you make to it?
- 3 A Didn't make any improvements.
- 4 Q How often did you visit that piece of property?
- 5 A Sometimes once, twice, sometimes three times a year.

11/07/07 RP 205.

There is no evidence nor testimony at trial that the Cogdell structures interfered with the very limited use and enjoyment of this recreational land by Respondent O'Ravez.

The benefit would also be equally small or nominal as the use of this area was never bargained for, intended or anticipated to be used by the respondent O'Ravez.

(4) There is ample remaining room for O'Ravez to construct a structure on any one of the numerous building sites on

the remaining 19.5 acres, suitable for the area and with no real limitation on the property's recreational use.

Respondent O'Ravez's property had numerous building sites,

Mr. O'ravez stated:

- 11 Q (By Mr. Lockwood) Okay. Thank you.
12 If you look at the topography of the ground down
13 here, you said there's a ridge down here with the view
14 sites that were down here?
15 A No. Along the ridge.
16 Q Along the ridge. Okay.
17 How close is that ridge to the boundary line?
18 A To the current boundary line or to the boundary line that
19 was pointed out to me through arm motion?
20 Q However you want to describe it. How close is that ridge
21 to the boundary line?
22 A To the boundary line that's - - that was pointed to me by
23 Mr. Cogdell, it was - - that ridge was several hundred
24 feet. Several hundred feet north of the south boundary
25 line.

Vol 2 RP 210.

There were other building sites which were available to the Respondent which were identified when the property exchange took place. The Appellants' home site was never considered a possible building site for Respondent O'Ravez.

There was no interference with Respondent's use with numerous building sites available, which were located by Respondent O'Ravez.

(5) It is impractical to move the Cogdells' home as built.

The home, garage and pool are built on significant foundations due to the hillside and coupled with the implacability to tear down and move the two-story home.

Photographs of the Cogdells' home show that it is located on a hillside and that it would be difficult and impractical to move. It was requested that the court take judicial notice of the difficulty in moving a home but the court failed to consider it. This is especially evident in light of the last element.

(6) There is an enormous disparity in resulting hardships. The Cogdells use this property for their home and have resided there since the construction was complete. A removal of the home would entail significant costs. O'Ravez has only used this property for recreational purposes and has never built any structures or made any improvements. The land on which the Appellants' structures are located were never intended to be part of the O'Ravez parcel. There is no restriction on the Respondent's limited recreational use of the property.

Because of the facts of this case and it not being a traditional encroachment case, the case clearly falls into the exception for a harsh result as described in *Arnold*.

More recently this issue has been reviewed by the Washington Supreme Court in *Proctor v. Huntington*, 82326-0 (WASC) which was issued on August 19, 2010.

The Issue presented in *Proctor* is very close to the facts in this case. The major difference is that the appellant's structures were in place prior to the sale of property to the Respondent. In *Proctor*, the Huntingtons unwittingly built their house, well, and garage entirely on a portion of land owned by their neighbor, Noel Proctor. Proctor did not realize that the Huntingtons were encroaching at the time, but, when he learned of the true boundary line between the properties, he sued to eject them. The trial court refused to issue an injunction forcing the Huntingtons to remove their home, instead requiring Proctor to deed them the acre underlying it and accept payment for the value of the land. Proctor asserted that this equitable remedy was impermissible under the circumstances of this case. The Supreme Court disagreed and affirmed the trial court. In so holding the Proctor court stated:

Proctor argues for a hard and fast rule that unless an encroachment is "slight" in an absolute sense, a court must always grant an injunction to eject the encroacher. But, our case law affords a trial court greater flexibility. The entire purpose of our pronouncement in *Arnold* was to show that injunctions should not mechanically follow from any

encroachment. See *Arnold*, 75 Wn.2d at 152 ("Ordinarily, . . . a mandatory injunction will issue to compel the removal of an encroaching structure. However, *it is not to be issued as a matter of course*. . . . [T]he court must grant equity in a meaningful manner, *not blindly*." (emphasis added)). A court asked to eject an encroacher must instead reason through the *Arnold* elements as part of its duty to achieve fairness between the parties. See *Young v. Young*, 164 Wn.2d 477, 488, 191 P.3d 1258 (2008) (discussing a court's "tremendous discretion" to do justice when fashioning an equitable remedy). This is the essence of the court's equity power, which is inherently flexible and fact-specific. See *id.* at 495 ("[F]lexibility is crucial in fashioning remedies that do equity to the parties.").^[8]

Here, although encroachment on an acre of Proctor's land (worth \$25, 000) was not "slight" in an absolute sense, that was not the key question before the trial court. The question was whether, in equity, it would be fair and just to require the Huntingtons to remove their entire house, garage, and well—at an estimated cost of over \$300, 000—because of both parties' good-faith surveying mistake. The benefit of removal to Proctor would be to gain an acre. (As for the house, Proctor admitted he did not know what he would do with it, seeing as he had built his own house shortly after the Huntingtons' house was constructed. RP at 810; RP at 404.) The acre of land would not appreciably increase the value or size of Proctor's parcel, which totals 30 acres.^[9] On these particular facts, the trial court could fairly characterize the benefit to Proctor as minimal. In contrast, ejectment would impose a great hardship on the Huntingtons because they would have to remove and reconstruct their house and garage and drill a new well. (The loss of one acre of land itself would not impose hardship on the Huntingtons, as they also owned much more than one acre.) The trial court's equitable approach in

this case fits comfortably within the good-faith-mistake line of cases, including *Arnold* and *Bufford*, in which equity allows a court to apply a liability rule in lieu of rote application of a property rule. Because the trial court's chosen remedy was proper under *Bufford* and *Arnold*, the Court of Appeals was right to affirm it.

In upholding the equitable remedy imposed by the trial court, we recognize the evolution of property law in Washington away from rigid adherence to an injunction rule and toward a more reasoned, flexible approach.

It is argued that the trial court's conclusion of law is not supported by substantial evidence and is arbitrary, manifestly unreasonable and based on untenable grounds by the lack of evidence. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true." *Hegwine v. Longview Fibre Co.*, 132 Wash.App. 546, 555-556, 132 P.3d 789 (2006).

It is argued by the Cogdells that a reasoned approach would be an equitable property line adjustment as suggested to the court by both parties. The adjustment of the boundary line was proposed to the trial court and felt to be the most equitable.

B. Assignment of Error No.2, The Court erred in entering Conclusion of Law:

The Court's findings of fact entered upon conclusion of the bench trial in this matter, including Finding of Fact XXV in particular, established that the Cogdells, by not obtaining a survey, took a calculated risk in deciding where to construct their improvements and subsequently selling the property by statutory warranty deed to the O'Ravez Family.

The trial court following trial ordered that the Appellants' structures remain in place and granted an easement over and across Respondent O'Ravez's property. The Appellate Court felt that was not equitable as the Respondent received nothing in exchange. This Court did not order ejectment, only that a more equitable remedy be applied, of which there are several.

It is important to note that the trial court found that both parties were equally at fault in having a boundary discrepancy due to both parties choosing to not get a survey at the time the Respondent acquired the property. The Court found as follows:

Court Findings XIX:

XIX.

The deeds do define the boundaries of those two areas, the Cogdells and O'Ravezes, pursuant to the description on the deeds that were issued. To do a balancing of the equities, the parties that are seeking equity have to do equity. There has to be an innocent party. The innocent party has a right to equitable

relief. The Cogdells and the O'Ravezes' lack of zeal or lack of interest sufficient enough to take it upon themselves to define that boundary line is a push.

Court Findings XX:

XX.

Neither one is more innocent than the other in that regard, but the O'Ravezes didn't encroach or harm nor do anything to obstruct or conflict with ownership of the land that Cogdell had. Cogdell, maybe not intentionally, did encroach and did take O'Ravezes' real property. That can't be remedied by any money damage because of bankruptcy. The Court has not been able to resolve in equity a land swap or a redefining of the lands that would compensate that would make sense.

The above findings are significant in light of the fact that Respondent O'Ravez seeks equitable relief. Equity jurisprudence requires the party seeking equitable relief to have acted in good faith and to come into equity with clean hands. *Cascade Timber Co. v. N. Pac. Ry. Co.*, 28 Wn.2d 684, 711, 184 P.2d 90 (1947). How can the Respondent have "clean hands" when he is equally at fault for the resulting boundary discrepancy?

At trial Respondent O'Ravez testified he knew there was a problem with the boundary line pointed out by Appellants Cogdell prior to closing.

Mr. O'Ravez stated at trial:

Page 211

- 19 A Originally I said that the Bureau of Reclamation marker
20 was found as well as in the southwest corner and up in
21 the southeast corner there was a marker. And those
were
22 both showed to me by Mr. Cogdell.
23 Q Okay. You've indicated you found a marker down here
and
24 a marker over there. Did you find these markers before
25 or after you purchased or did the exchange on this

Page 212

- 1 section?
2 A I believe those boundaries were pointed out originally.
3 Q When you say originally?
4 A Originally when we first looked at the property.
5 Q So when you first looked at the property?
6 A That 's correct .
7 Q So you were aware of these markers at the time that the
8 exchange took place?
9 A Yes.
10 Q So when Mr. Cogdell told you where the boundary line
was,
11 was he consistent to where these markers are?
12 A Those markers, you can't see one from the other.
13 Q Okay .
14 A There were no markers in between. The terrain is
15 undulating. There was no way, I mean it's easy to get
16 off several degrees.
17 Q So you were aware of these corner markers which are in
18 red marked on the sheet in the southwest and the
19 southeast corner, and when Mr. Cogdell pointed out
where
20 the boundary lines were, you were aware of those
markers.
21 Did what he pointed out to you jive with what you
22 thought by looking at those, knowing where those
markers

23 were?

24 A No.

25 Q Did you tell Mr. Cogdell that the boundary line that he's

Page 213

1 telling you at that time didn't jive with the markers

2 that you knew about ?

3 A Not that I recall.

VOL 2 RP 211-213.

Respondent O'Ravez had actual knowledge or at a minimum reasonable suspicion that Appellant Ron Cogdell was mistaken as to what he thought the boundary to be. Respondent O'Ravez does not have clean hands.

It is further of importance that Respondent O'Ravez did not care where the boundary line was located nor did they bargain for or intend to acquire the Appellants Cogdell's well or building site. Testimony at trial clearly demonstrated these important points.

Appellants Cogdell would not have sold if the error in the boundary line was known to them. Mr. Cogdell stated:

1 Q Would you have sold that second parcel to Mr. O'Ravez
had

2 you known that he would be claiming land up to the
3 surveyed line?

4 A No.

5 Q Why is that?

6 A Well, I wasn't going to sell him my well and my house
and

7 my building site. That makes zero sense to do anything

8 that dumb. So I didn't.

11/07/07 RP, p. 94.

It is undisputed that the well and building site were not intended to be sold. Mr. Cogdell stated:

4 Q When you sold this parcel, the second parcel to
5 Mr. O'Ravez, did he -- or did you intend to sell him the
6 well?

7 A No.

8 Q And did you intend to sell him the building site?

9 A No.

11- 08-09 RP 76.

In regard to the well and building site, the Respondent, Mr.

O'Ravez, stated at trial:

1 Q The piece of ground you were buying from the
2 Cogdells, the second parcel, was it to include a well?

3 A Absolutely not.

4 Q Okay. And was it going to include an improved building
5 site?

6 A Absolutely not.

Vol II RP 255 Line 1-6.

The Respondent, Mrs. O'Ravez, further stated at trial:

14 Q Was it your intention when you bought your property
15 that you're buying the well and the building site?

16 A No, never was.

11/08/07 RP 155.

Mr. O'Ravez again confirmed his intention:

7 My main concern was with the 20 acres. I didn't want

8 their well. I didn't want the future home they were
9 going to build. It was never my intention. Only
10 20 acres.

11/08/07 RP, p. 312.

A well and a building site are costly improvements;
Respondent O'Ravez was not buying the improvements, had no
intention to buy the improvements, and did not bargain for them.
Respondent O'Ravez further did not care where the property line
was located just as long as they received 20 acres.

Respondent O'Ravez was very clear in that the boundary
location was not important just as long as he received 20 acres.
But, what is equally clear is that there was no intent by either party
to sell Appellants Cogdell's well and building site. These valuable
improvements were to remain with the Cogdells.

Mr. O'Ravez stated to the trial judge:

5 Q So really you didn't really care where this boundary line
6 was referenced by Mr. Cogdell?

7 A My main concern was with the 20 acres. I didn't want
8 their well. I didn't want the future home they were
9 going to build. It was never my intention. Only
10 20 acres.

11 Q So the fact that what you bought by what Mr. Cogdell sold
12 you wasn't 20 acres, was that a mistake? Were you
13 mistaken?

14 MR. DELAY: Objection, calls for a conclusion.

15 That's an issue for the Court to decide.

16 THE COURT: Well, his testimony is he thought he was
17 buying 20 acres **and his intent was to buy 20 acres. The**

18 *boundary line that defined those 20 acres wasn't as*
19 *important as knowing within the boundary there were*
20 *20 acres.*

21 *Is that a fair representation?*

22 **THE WITNESS:** *That is well put.*

23 **THE COURT:** *So I got it.*

24 MR. LOCKWOOD: Okay.

25 **Q (By Mr. Lockwood)** *You didn't really care what 20 acres*

1 *you got but my understanding that whatever 20 acres*
you

2 *got, you never intended to include the well or*

3 *Mr. Cogdell's building site?*

4 **A** *That is correct.*

11/08/07 RP, 275-276 (Emphasis added).

There was not a calculated risk as to the construction of the Cogdell's improvements. Rather there was a mistake as to the location of the boundary line.

It is important to point out to this Court that under the circumstances, the parties would have been in the same situation had the Cogdell home been built years earlier--the error in the boundary line caused the problem, not the construction of the improvements.

C. Assignment of Error No. 3 The Court erred in entering Conclusion of Law:

The Finding of Exceptions which would allow the Court to provide relief other than ejectment had been referred to as the Arnold exceptions. Absent a finding based upon clear and convincing evidence that the Arnold

**exceptions had been satisfied, a remedy other than
ejectment becomes more than suspect.**

The trial court following trial did not find that ejectment was the only remedy available based upon equity. The trial court granted the Cogdells an easement but with no corresponding benefit to the O'Ravez resulting in a remand.

Due to the nature of the facts of this case, this litigation does not fall squarely into a traditional encroachment case. However, equity would still apply and the court has several options for a remedy.

In *Pepper v. J.J. Welcome Const. Co.*, 73 Wn.App. 523, 543-544, 871 P.2d 601 (Wash.App. Div. 1 1994) the court held:

The goal of awarding damages is to fully compensate the plaintiff for loss or injury. One should not recover any windfall in the award of damages, but should receive an award which does no more than put the plaintiff in his or her rightful position. 1 Dan B. Dobbs, Remedies § 3.1, at 280 (2d ed. 1993).

The rightful position would be to put the parties in a position for which they bargained: where Respondent O'Ravez has 20 acres but not the well and building site which they did not bargain for, were not buying, and had no intent to buy.

The trial court on remand made a drastic 180 degree change in its prior decision and ordered ejectment of Appellants

Cogdell, turning over the well and building site to Respondent O'Ravez. This decision in effect gives the benefit of the well and building site to Respondent O'Ravez. This decision results in windfall to the Respondent as there was no intent to sell or buy these improvements.

The trial court had several options including establishing the value for the easements or by the option put forth by the parties.

Respondent O'Ravez proposed:

- 13 Q (By Mr. Delay) Now, I put on the board Exhibit 142 for
14 identification. Can you tell the Court what that is?
15 A It's the last series of offers to settle the boundary
16 dispute whereby we give them approximately 1.8 acres
17 around their home and well, and we take approximately
18 4.8 acres -- or six acres total.
19 Q So this is a proposal you're suggesting to the Court to
20 solve the problem; is that correct?
21 A Yes.

11-13-07 RP 130.

Appellants Cogdell objected a number of times to the admission of settlement proposals but the court overruled the objections and allowed the testimony only for purposes of possible remedies by holding:

- 5 Q Okay. Did they come back with any options after that?
6 A Not by March of --
7 MR. LOCKWOOD: I'm going to object. You may overrule,

8 but I just need to make a record.
9 THE COURT: Based on? For the record, Counsel,
10 based on compromise?
11 MR. LOCKWOOD: Yes.
12 THE COURT: Again, I might make a statement. The
13 rulings that I've made regarding testimony that's been
14 objected to based on compromise, that particular
15 concept
16 is one where the compromise settlement cannot be
17 generally
18 accepted if, in fact, it's admitted for purposes of
19 liability, to show liability, to show fault or any of
20 those factors, and the Court is not accepting this
21 testimony in regard to any of those factors.
22 The testimony that's being offered at this time will
23 not be considered or relied upon by the Court to
24 establish
25 who's right or who's wrong. **It's being offered and
accepted only for the purpose of understanding what
remedies are available should the Court decide one
way or
the other, but not for the purposes of liability.**

11-13-07 RP 128 (Emphasis added).

Appellants Cogdell also proposed a similar resolution:

4 Q What are you asking the Court to do? What relief are you
5 asking the Court to grant you today?
6 A I guess that, you know, everybody has got some blame
7 in
8 this deal. I'm not going to say I don't. I would say we
9 could amend the deeds to the property lines that Bill
10 bought to reflect that, or I can buy the property back
11 from Mr. O'Ravez for what he paid for it.
11 Q Thank you .

11-07-07 RP 96.

The trial court refused to do a boundary line adjustment as

proposed by both parties at trial and ordered an easement which was appealed and remanded. Again the trial court has rejected what the parties requested at trial and ordered ejectment, which results in a windfall for Respondent O'Ravez.

This court previously held in this case *Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wn.App. 384, 390, 220 P.3d 1259 (Wash.App. Div. 3 2009):

A court in equity has broad discretion to fashion a remedy to do substantial justice and end litigation. *Hough v. Stockbridge*, 150 Wash.2d 234, 236, 76 P.3d 216 (2003). Equity does not permit a wrong without a remedy. *Crafts v. Pitts*, 161 Wash.2d 16, 23, 162 P.3d 382 (2007) That is to say, equity must be applied in a meaningful manner. *Arnold v. Melani*, 75 Wash.2d 143, 152, 449 P.2d 800 (1968)

The trial court had several options that would have been equitable which include a boundary adjustment proposed by both parties at time of trial, payment of the value of the land encroached on as in *Proctor*, supra, or sale of the encroachment at the fair market value. Any of these remedies would have prevented a windfall for Respondent O'Ravez.

D. Assignment of Error No.4, The Court erred in entering Conclusion of Law:

Among others, Conclusion of Law No.2 alone defeats a finding that all of the Arnold elements are satisfied.

The Court's Conclusion of Law No. 2 has been previously addressed but additionally there is no evidence that the Cogdells took a calculated risk when they began construction on their improvements as they owned both parcels.

The mistake was in locating the boundary, not in building the structures. As such there was no calculated risk at the time the improvements were built. Appellants Cogdell relied on survey markers which were in place at the time they purchased the property. When Appellants sold to Respondent O'Ravez, Appellants Cogdell relied on the existing survey markers as the boundary for the property they were selling to the Respondent. Mr. Cogdell stated:

- 14 Q So if we looked at what markers were on the ground to
15 Identify the property line, what would they be?
16 A On the ground up here at the top of the hill there was a
17 metal pin in the ground and there was-- a the surveyors
18 use those little sticks, I don't know what you call them,
19 with some writing on them. Red flagged. And all this
20 property that had been surveyed at one point, by who I
21 don't know, but there were a ton of different markers all
22 over the place. I mean there was survey tape. Bill put
23 survey tape out there. I put survey tape out there.
24 walked the lines, and it was just the way it was.
25 Everybody was, you know, fine with what was going on
- 1 until the survey that Bill had done and found out that my
2 property was not -- my house was supposedly not on my

3 property.

11-07-07 RP 75-76.

Appellants Cogdell did not sell the parcel to the Respondent O'Ravez then build, but rather built then sold a parcel to Respondent O'Ravez. Thus it was not a calculated risk when Appellants Cogdell built, but rather a mistake as to the boundary.

E. Assignment of Error No.5, The Court erred in entering Conclusion of Law:

The Cogdells have failed to offer clear and convincing evidence, or any evidence, as to the practicality of moving their improvements, or the expense involved in moving their Improvements.

It should be noted that at trial Respondent O'Ravez did not ask the court for ejectment. In fact, at trial testimony revolved around a boundary adjustment. Neither party could agree on a property adjustment and requested the court provide one. As a result, the issue of moving the house never came up at trial.

On remand it was requested that the court take judicial notice that due to the location of Appellants' home being on a hillside, that the costs to move the structure would be substantial.

ER 201 (b) states:

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Appellants Cogdell argue that the costs of moving a two story house, garage, in-ground pool, and well built on a hill side will be substantial. Judicial notice can be taken although the exact amount is not known it can be recognized that the costs would be substantial.

F. Assignment of Error No.6, The Court erred in entering Conclusion of Law:

The evidence is equally clear that the Cogdells have refused significant efforts and overtures of the O'Ravez Family's attempt to due equity prior to resorting to requesting ejection.

The trial court allowed Respondent O'Ravez to give testimony regarding offers of settlement over the objection of the Appellant Cogdell.

9 MR. LOCKWOOD: I'm going to object to this line of
10 questioning, Your Honor. These are all settlement
11 discussions.
12 THE COURT: I think you had asked a question and a
13 response came from the witness about his offers.
14 MR. LOCKWOOD: He asked if -- he's asking questions
15 regarding settlement discussions. My client offered you
16 this, we offered to buy your property. I mean it's all
17 offers to buy property. It's all settlement discussions.

18 THE COURT : I think we've kind of been there on that
19 at this point.

11-08-07 RP 176.

Following the trial court's decision to allow settlement
discussions the court stated:

1 THE COURT: Before you answer, I want to
2 make another comment I'm accepting this testimony --
we've
3 gotten beyond where I had hoped we would be regarding
4 offers of settlement and compromise. This testimony is
5 coming in not for the purpose of determining what the
6 parties' positions were or weren't in the compromised
7 situation. **It is only being accepted to discuss what**
8 **this party's remedies being sought and nothing**
more. Not
9 involving the settlement or the compromise of it, it is
10 simply to discuss no different than if it was a
11 plaintiff seeking money damages and explaining medical
12 damages and I want my lost wages and I want my car
fixed
13 and I want pain and suffering and those kinds of
14 concepts. **That's what I'm viewing it as and no more.**

11-08-07 RP 333 (Emphasis added).

The court references "significant efforts and overtures of the
O'Ravez Family's attempt to due equity" is nothing more than
settlement offers which were objected to and the court indicated
that they would only be used by the court for remedy suggestions.

At this juncture it appears the trial court is using the
settlement proposal as a partial basis for the ejectment which is

contrary to the court's ruling in allowing the testimony.

G. Assignment of Error No. 7:

The Trial Court erred in awarding defendant damages for Breach of Warranty due to appellant's Bankruptcy.

The trial court on remand reversed its prior decision and awarded damages and attorney fees for Breach of Warranty claim. The court's prior denial of Breach of Warranty damages was based upon Appellants Cogdell having filed for Bankruptcy protection and receiving a bankruptcy discharge for claims based on Breach of Warranty.

The parties recognized at trial that the "Breach of Warranty" claim of Respondent O'Ravez was subject to Appellants Cogdell's bankruptcy discharge pursuant to Appellants Cogdell's Chapter 7 Bankruptcy.

The Court's oral ruling adequately described the law:

19 If breach of warranties were involved, we'd have
20 breach of warranties but the remedies would never be
21 available based upon a bankruptcy. Equitable remedies
22 available even though there's a bankruptcy. But the
23 equitable remedies, if any, can only be granted if
24 there's no alternative right to money damages and with
25 the bankruptcy there is none. So an equitable remedy

- 1 that would be granted has to be a remedy that can't
- 2 equate to a money damage or have an ultimate money
- 3 damage element to it.

7-8-07 RP, p. 390-391.

Appellants Cogdell filed for Federal bankruptcy protection in 2002, and received a discharge (7-7-07 RP, p. 94). This was prior to any dispute arising with Respondent O'Ravez. The Appellants' bankruptcy was not filed as a result of the Respondent's claim. However, due to the filing the claims were subject to the bankruptcy jurisdiction. Their case was reopened due to a possible payment from the Exxon Valdez settlement due to Appellants Cogdell having worked in Alaska (Plaintiff's Exhibit 028) (7-7-07 RP, p. 94). Appellants Cogdell received a Chapter 7 bankruptcy discharge on June 5, 2002 (Plaintiff's Exhibit 031). Appellants Cogdell's discharge was never revoked (7-7-07 RP, p. 95). Appellants Cogdell amended their bankruptcy schedules after it was reopened to specifically give notice to Respondent O'Ravez of the discharge of their Breach of Warranty claims evidenced by Plaintiff's Exhibit No. 030 (7-7-07 RP, p. 95).

In a Chapter 7 bankruptcy, at the time fixed for filing a complaint objecting to discharge, a bankruptcy court will grant a

discharge to a debtor. *FED. R. BANKR.P. 4004(c)*; see 11 U.S.C. § 524(a), 727(a), if no objection is filed. The discharge acts as a permanent injunction, barring any person from acting to collect, recover or offset the debtors discharged debts. *11 U.S.C. § 524(a)*. The discharge specifically eliminated the remedy at law for an alleged "Breach of Warranty;" however, the parties had remaining equity claims.

After Appellants Cogdell's discharge under their Chapter 7 Bankruptcy proceeding, all of Appellants Cogdell's debts and liabilities on any "Breach of Warranty and Attorney Fee claim" was discharged pursuant to *11 U.S.C. § 727*.

A discharge under subsection (a) of *11 U.S.C. § 727* discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under *11 U.S.C. § 502* as if such claim had arisen before the commencement of the case.

The trial court on remand again reversed its prior decision and in error awarded damages and attorney fees for the Respondent's Breach of Warranty claim which is a violation of the Federal bankruptcy protection.

H. Assignment of Error No. 8:

Trial court erred in awarding defendant attorney fees incurred at trial as this issue was not remanded for further action.

The issue of the bankruptcy discharge was raised in the prior appeal. This court did not remand the issue of the bankruptcy discharge back to the trial court and thus became the law of the case. In *Roberson v. Perez*, 156 Wash.2d 33, 41, 123 P.3d 844 (2005) the court held:

. . . the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.

The original trial court's decision failing to award damages or attorney fees based upon Breach of Warranties would continue to control on remand.

The trial court erred in awarding attorney fees based upon Respondent O'Ravez 's Breach of Warranty claim.

I. Assignment of Error No.9:

Trial court did not find the Respondent O'Ravez had "clean Hands".

The court was quite clear that both parties failed to get a survey and there was no innocent party as to the boundary discrepancy.

(CP 370). The trial court indicated Respondent O’Ravez tried to do equity (CP 377). However, the standard is not that a party tries to do equity but rather a party seeking equity have “Clean Hands”.

It is long standing law that equity requires the party seeking equitable relief to have acted in good faith and to come into equity with clean hands. *Cascade Timber Co. v. N. P. Ry. Co.*, 28 Wash.2d 684, 711, 184 P.2d 90 (1947) (quoting 49 Am.Jur. 10, § 6). That is not the case here. In fact, testimony at trial indicated Respondent O’Ravez had actual knowledge that Appellant Ron Cogdell was mistaken in his belief of where the boundary line was and failed to say anything.

23 Q Okay. You've indicated you found a marker down here and

24 a marker over there. Did you find these markers before
25 or after you purchased or did the exchange on this

1 section?

2 A I believe those boundaries were pointed out originally.

3 Q When you say originally?

4 A Originally when we first looked at the property.

5 Q So when you first looked at the property?

6 A That's correct.

7 Q So you were aware of these markers at the time that the
8 exchange took place?

9 A Yes.

10 Q So when Mr. Cogdell told you where the boundary line
was,

11 was he consistent to where these markers are?

12 A Those markers, you can't see one from the other.

13 Q Okay.

14 A There were no markers in between. The terrain is
15 undulating. There was no way, I mean it's easy to get
16 off several degrees.
17 Q So you were aware of these corner markers which are in
18 red marked on the sheet in the southwest and the
19 southeast corner, and when Mr. Cogdell pointed out
20 where
21 the boundary lines were, you were aware of those
22 markers.
23 Did what he pointed out to you jive with what you
24 thought by looking at those, knowing where those
25 markers
26 were?
27 A No.
28 Q Did you tell Mr. Cogdell that the boundary line that he's
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Vol 2 RP 211-213.

Mr. O'Ravez has specific knowledge that Appellant Ron Cogdell was mistaken as to the boundary line but said nothing. That is not "clean hands"; as such, the Respondent should not reap the windfall of the equitable remedy of ejectment which would give him the well and building site the parties never intended to sell or buy.

VII. CONCLUSION

The timeline is important in this case. Appellants Cogdell had put in a well and, as indicated by Mrs. O'Ravez, and had

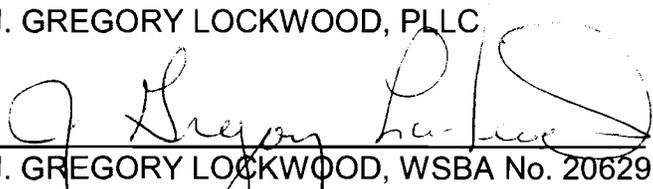
started the foundation of their house in August 1996. At that time Appellants Cogdell owned both parcels. Respondent O'Ravez did not acquire ownership of their parcel until January 1997.

The parties did not bargain for or intend to sell or buy the building site and well.

Respondent O'Ravez only wanted 20 acres and did not care where the boundary would be located. But Mr. O'Ravez did not have "clean hands" by having specific knowledge that the boundary line indicated by Mr. Cogdell was in error at the time of acquiring the property and said nothing. As such, Respondent O'Ravez should not benefit from the harsh remedy of ejectment and receive a windfall. This is especially so in light of alternative remedies such as a boundary adjustment or a equitable payment of the fair market value of the land on which the structures are located.

Respectfully Submitted this 16th day of May, 2011.

LAW OFFICE OF
J. GREGORY LOCKWOOD, PLLC



J. GREGORY LOCKWOOD, WSBA No. 20629
Attorney for Respondent Cogdells Cogdell

STATE OF WASHINGTON)
)ss
County of Spokane)

The undersigned, being first duly sworn on oath, deposes and says:

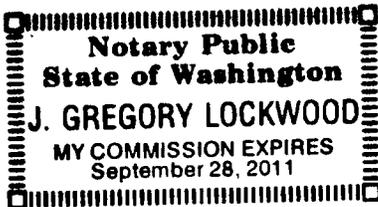
I am competent to be a witness in the above entitled matter; on the 17th day of May, 2011, I mailed via first class mail, with postage prepaid thereon a copy of the forgoing addressed to the below named as follows:

Michael S. DeLeo
Peterson Russell Kelly, PLLC
1850 Skyline Tower
10900 NE 4th Street
Bellevue WA 98004



SHERRY A. MORRISON

SUBSCRIBED AND SWORN to before me on this 17th day of May, 2011.


Notary Public
State of Washington
J. GREGORY LOCKWOOD
MY COMMISSION EXPIRES
September 28, 2011



Notary Public in and for the State of
Washington, residing at Spokane.
My Commission Expires: 9/28/11